



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Criminal Appeal 328 of 2008

CHARLES OKELO OLALA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a conviction and sentence of the High Court of Kenya at Malindi
(Njagi & Omondi JJ) dated 25th September, 2008**

In

**H.C.CR.A NO 49 OF 2008)

JUDGMENT OF THE COURT

CHARLES OKELO OLALA, the appellant herein was arraigned before the Chief Magistrate's Court at Malindi on charge of robbery with violence contrary to **section 296(2)** of the Penal code. The particulars of the offence were as follow:

“CHARLES OKELLO OLALA on the 7th day of October, 2002 at 12.00 midnight at Malindi new market parking yards in Malindi location within Malindi District of the Coast Province, jointly with others not before court, being armed with dangerous weapons namely pistols and knives robbed SHEDRACK THOYA MICHAEL of his motor- vehicle Reg. No. KAP 452Q Toyota Corolla white in color, Kshs, 2,800/- all valued at Kshs. 402,800/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said SHEDRACK THOYA MICHAEL.”

After a full trial before the learned Senior Resident Magistrate (C. Ogembo Esq), the appellant was convicted and sentenced to Death. The appellant's appeal to the superior court was dismissed and hence the appellant now comes before this Court by way of second and final appeal. That being so, this Court, by dint of the provisions of **section 361** of the Criminal Procedure Code (Cap 75 Laws of Kenya) only

matters of law fall for consideration.

The facts as accepted by the two courts below were that on 6th October, 2002 at about 11.45p.m. Michael Shadrack Thoya (PW2) a driver employed by Kefa Orango (PW1) to drive motor vehicle registration No. KAP 425Q white Toyota was at New Malindi Market when a man hired him to go to Ngala Estate. The man entered the vehicle, sat on the front passenger seat, and Thoya drove towards Ngala Estate. When the two got to Ngala estate as the passenger opened the door to come out three people, one of them holding a pistol and the other two had knives. The one who had a pistol put the pistol on Thoya's head while the two with knives pulled him (Thoya) to the back seat and sat there with him. The man with a pistol sat in front. Thoya did not make any noise out of fear as they tied his hands at the back. They drove to Gede forest, removed Thoya from the vehicle tied him to a tree and left him there as they drove off. Thoya did not identify any of his attackers. After sometime Thoya managed to untie himself and walked to Gede Petrol station where he reported the incident to the petrol station attendants, who informed him that the said vehicle had been there for fuel. Thoya reported the matter to the police who commenced investigations. That same night Maitha Nzanze (PW3) a gardener/guard of one Japheth Kiti was asleep with his wife Margaret Maitha (PW5) when a vehicle came to the gate and hooted. Maitha opened the gate and allowed the vehicle to come in. In the vehicle was the appellant whom Maitha, knew as a friend of the son of his employer (Japheth Kiti). The appellant informed Maitha that the vehicle had run out of fuel and that it had a problem with ignition. The appellant pleaded that he be allowed to leave the vehicle there until the following morning when he could fetch some petrol and mechanics to fix the problem. When invited to spend the night in the house, the appellant declined the offer and opted to sleep in the vehicle. The next morning he told Maitha that he was going to Kilifi and that he would be back at 2.00p.m. He however did not come back and the vehicle remained in that home for about a week. Maitha (PW2) went to Kilifi to see his employer's son Gideon who was a friend of the appellant and informed Gideon about the vehicle. According to Margaret (PW5) the appellant and Gideon came to the home and tried to start the vehicle but it could not start. They left the vehicle thus promising to come back the following day. After a few days the police came to this home and found the vehicle which was the same vehicle that Thoya had been driving when he was attacked by robbers. The vehicle was positively identified by both Orango (PW1) and Thoya (PW2). The appellant was later arrested and charged.

When put to his defence the appellant in his unsworn statement told the trial magistrate that on 13th October 2002 he was on his way to work and when he came back he was informed that police officers had been looking for him on allegation of suspected stolen property. His house was searched but no stolen property was found. The matter seemed to have rested until February, 2004 when he was arrested.

The learned trial magistrate considered the evidence before the court and was satisfied that the appellant was one of those who robbed Thoya of his vehicle (taxi) and that soon after the robbery the appellant drove the same vehicle to the house of Kiti where he was seen by Maitha (PW3) and his wife Margaret (PW5). In the course of his judgment delivered on 13th January 2005 the learned trial Magistrate said:

“I am convinced that PW3 was a credible and truthful witness and that he knew the man came with the car on the material night and that he I the accused in the dock. Even the accused in his cross-examination seemed to suggest that the 2 of them knew each other well. And to every detail, the evidence of PW3 was well corroborated by that of PW5 Margaret Maitha, his wife. PW5 even added the evidence that after leaving the vehicle parked in the compound, accused came in the company of Gideon on the 3rd day and the vehicle again could not start. Again this witness convinced me that she also knew accused well and that the accused also knows her. There was also no allegation of bad faith or malice on the part of these 2 witnesses that would make them lay false accusations on the accused. In fact, they so readily even mentioned the name of Gideon, a son to PW3’s employer.

I have also noted that the witnesses proved beyond doubt, that accused was well known to the said Gideon. Accused himself in his cross-examination confirms that he knows him too and even the fact that Gideon was also treated as a suspect and even arrested and granted bail only to jump bail or abscond. So, the question to answer is whether accused was among the 4 men who robbed PW2 of the motor Vehicle on the night of 7/10/02. PW2 himself says he could not identify any of he robber. The robbery was alleged to have taken place at about 11.45pm. at the New Market in Malindi. And it is the same night that both PW3 and PW5 saw accused with the vehicle in Chuman, past Gede. So how did the accused come to hold and possess this motor vehicle so soon after it had been stolen from PW2. To me, accused must have been part of the group who robbed PW2 Michael Shadrack Thoya of motor vehicle KAP 452Q while armed with a pistol on the night of 6/10/2002. And he must have driven it to the home in Chumani to either keep it there temporarily, or as PW3 and PW5 alleged, because the same ran out of fuel.”

As already stated elsewhere in this judgment the appellant’s appeal was dismissed by the superior court. In its judgment delivered on 25th September, 2008 the High Court (Njagi and Omondi JJ) stated inter alia

“The learned trial Magistrate then considered the explanation as to how the appellant came to have the said motor vehicle so soon after it had been stolen from PW2 and concluded that appellant must have been part of the group who robbed PW2 while armed with a pistol on the night of 6/10/2002 and that appellant must have driven it to the home in Chumani to either keep it there temporarily, or as PW 3 and PW 5 alleged, because the same ran out of fuel.”

The learned Judges of the superior court appreciated that the appellant’s conviction in the trial court was based on the doctrine of recent possession. In that respect the learned Judges made the following observations in their judgment.

“Could the robbers have simply assigned appellant the duty of driving away the motor vehicle to another place? We consider the doctrine of recent possession – would the chain of events be such that the possession of an item so recently robbed off the victim landed into the possession of appellant have no other explanation other than to link him with the attackers? The appellant opted not to show how he came into possession of the motor vehicle, preferring in his defence to dwell on the events of the day of his arrest. How did he come to have the vehicle so soon after the robbery? The appellant’s activities involving the motor vehicle are an excellent circumstantial proof of linkage between the appellant and the robbery – more so considering that Gede Forest where PW2 was abandoned, and Chumani where motor vehicle (which is ahead of Gede) – where the motor vehicle was taken to and eventually recovered, are not too far apart.”

Having so stated the learned Judges concluded their judgment thus:-

**“The upshot of our finding is that the learned trial magistrate duly considered and analysed the evidence presented and properly convicted the appellant – that conviction was safe and we uphold it. The sentence was legal and we confirm the same.
The appeal is subsequently dismissed.”**

It is the foregoing that gave rise to this appeal which came up for hearing on 26th January, 2010.

Mr. M.E. Jengo appeared for the appellant while Mr. J.M. Ondari (Assistant Deputy Public Prosecutor)

Mr. Jengo relied on the “home made” memorandum of appeal prepared by the appellant.

In his submissions Mr Jengostarted by saying that the prosecution had not proved the case against the appellant beyond reasonable doubt in that there were contradictions in the evidence of prosecution witness. He complained that the vehicle the subject matter of the robbery charge was not produced in the trial court as an exhibit. He said that some of the witnesses gave description of the vehicle but merely identified the vehicle in the compound where Maitha (PW 3) had been employed.

It was further submitted that the robbery might not have taken place as the evidence of Thoya (PW2) was incredible.

On the doctrine of recent possession Mr. Njengo submitted that the evidence was not sufficient. He contended that there was a possibility that the appellant was assigned the vehicle to drive it away.

Mr. Jengo went on to argue that there was doubt as to the identification of the appellant by Maitha (PW3) and his wife Margaret (PW 5).

Finally Mr. Jengo was of the view that the trial was a nullity as on the day of taking the plea unqualified person appeared as the prosecutor.

On his part Mr. Ondari started with the issue of unqualified prosecutor. He submitted that the trial of the appellant was conducted by qualified prosecutor as what Mr. Jengo complained of related to the day the plea was taken and in any case the appellant denied the charge and was afforded a full trial.

As regards identification of the appellant Mr. Ondari submitted that the appellant was known to the two witnesses as Maitha (PW3) and his wife (PW5) and that the appellant was in that home several times.

As regards the argument that the robbery did not take place Mr. Ondari referred to the evidence of Orango (PW1), Thayo (PW 2) and Juma Mwadama (PW4) which confirmed that a robbery indeed took place.

As regards the doctrine of recent possession Mr. Ondari submitted that the appellant was in possession of the vehicle only a few hours after the robbery. The appellant failed to give any explanation as to how he came to be in possession of the said vehicle. For that reason, Mr. Ondari contended that the appellant was convicted on very sound evidence of being in recent possession of the vehicle that had been stolen from Thoya (PW 2).

As already stated this is a second appeal and only matters of law fall for consideration. We have concurrent findings of fact by the two courts below, that a robbery indeed took place in which Thoya (PW2) was robbed of the vehicle in question – a Toyota Corolla white in colour registration KAP 452Q. According to the evidence of Thoya (PW2) the robbery took place soon after 11.45pm on 6th October, 2002. He was subjected to rough treatment by the robbers who tied up his hands and tied him on a tree in the forest as they drove away with the stolen vehicle. The same night the appellant drove this vehicle in the compound of one Japheth Kiti where Maitha (PW3) and his wife (PW2) were found. These two testified how the appellant slept in that car until morning when he said that he was going to get fuel and mechanics. According to Margaret (PW5) the appellant and one Gideon (now deceased) and a son or

nephew of Japheth Kiti went back to that home and tried to start the car a few days later but the car could not start. They left it there only for police officers to come and tow it away. It is upon that evidence that both trial court and first appellate court came to the conclusion that the appellant was found in recent possession of the car that had been recently stolen from Thoya (PW 2). The appellant offered no explanation as to how he came to be in possession of this recently stolen vehicle. The learned trial magistrate considered the evidence of Thoya (PW2) Maitha (PW2) and his wife Margaret (PW5) and believed them as witnesses of truth. The first appellate court went through that evidence, re-evaluated it and was satisfied that these witnesses told the truth. In **Gachuru vs Republic [2005] KLR 688** this Court held as follows:

“As a second appeal only points of law may be raised since the court will not disturb concurrent findings of fact made by the two courts below unless these findings are shown to be based on no evidence.”

In this appeal we have considered the concurrent findings of fact made by the two courts below and are satisfied that those findings were based on sound evidence. We have considered the submissions of Mr. Jengo on the issue of contradictions in the evidence of prosecution witnesses but we find no merit in those submissions. The victim of the robbery testified how he was subjected to a harrowing experience ending up being tied up on a tree in the forest. He managed to untie himself and reported the incident, first to the nearest petrol station and then to the police. He also reported to the owner of the vehicle, one Orenge (PW 1). As a result the police commenced investigations which led them to the house of Japheth Kiti where the stolen vehicle was recovered. Maitha (PW3) was naturally suspected to have been connected with the theft but he had a reasonable and honest explanation which was accepted. Police investigations ended in the arrest of the appellant who had no explanation for being in possession of the recently stolen vehicle.

In **Ogembo vs Republic [2003] 1 EA 222** at page 225 this Court said:

“Dealing with a similar point, the Court of Appeal for Eastern Africa (as it was then) said as follows in the case of R v Bakari s/o Abdulla [1949] 16 EACA 84.

“That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point no other reasonable conclusion, the presumption can extend to any other charge

however penal”.

This principle was quoted with approval in the case of Obonyo vs Republic [1962] EA 592. In this case the court stated as follows:

“If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal”.

In this we are satisfied the circumstances of the case did not point to any other reasonable conclusion other than the conclusion that the Appellant was one of the six robbers that terrorized the two families in Bureti district and that he was arrested with some of the stolen property a day after the robbery in Kisii which is not far from Bureti considering the fact that the robbers had easy transport namely the stolen vehicle.”

And in Matu vs Republic [2004] 1 KLR 510 this Court was dealing with a similar situation in which it conducted its judgment thus:

“The inevitable conclusion therefore, is that the appellant was in possession of the goods stolen from the complainant’s kiosk and he could not offer any acceptable explanation of how he came by them. The two courts below came to the same conclusion and rightly so in our view, that the appellant was one of the robbers.”

On the doctrine of recent possession we are satisfied that this was correctly applied in this case, since the appellant was in recent possession of a vehicle which had just been stolen. The appellant gave no explanation as to how he came by the stolen vehicle. In the circumstances of the case there could be no other reasonable conclusion other than the conclusion that the appellant was one of those who had robbed Thoya.

As regards the submission that unqualified prosecutor appeared at the time of taking plea all we can say is that the said prosecutor conducted no prosecution. In any case the appellant pleaded not guilty and was afforded a full trial in which a qualified prosecutor conducted the prosecution.

In view of the foregoing we find no merit in this appeal. We order that the same be and is hereby dismissed in its entirety.

Dated and delivered at Mombasa this 12th day of March, 2010.

E. O. O’KUBASU
.....
JUDGE OF APPEAL
J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL
ALNASHIR VISRAM

.....
JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR